Supreme Court, U.S.
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No. 03-781

In The Supreme Court of the United States

JIMMY DOUG SHELTON,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

MICHAEL S. FAWER
Attorney at Law
301 N. Columbia Street
Covington, Louisiana 70433
(985) 871-7200
Counsel of Record

HERBERT V. LARSON, JR.
Attorney at Law
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500

Attorneys for Petitioner Jimmy Doug Shelton

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I.

Whether the Government can obtain valid consent to search a third-party's property from one of its own agents, when that government agent's "common authority" over the property to be searched had been given to her in her capacity as a private citizen.

II.

Whether searches conducted by a private party who is acting as a government agent are subject to the warrant requirement of the Fourth Amendment, when that private party would otherwise have the right to conduct such searches.

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REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioner Jimmy Doug Shelton respectfully submits the following reply to the brief that the United States submitted in opposition to his petition for a writ of certiorari.

ARGUMENT

The Government's opposition is founded on two premises: (1) that Shelton's claim is not properly before the court, because it was not raised in the courts below; and (2) that "in any event [it] does not warrant this Court's review" (Government's Opposition, p. 7). As is demonstrated below, the Government's first premise disregards the record, and essentially "begs the questions" the petition for certiorari raises. The Government's second premise is equally flawed, and trivializes the major constitutional issues at stake in this proceeding.

1. The arguments and issues in the courts below

As was noted in Shelton's petition for certiorari, at footnote 1, Shelton's original motion to suppress raised almost every conceivable ground for suppressing the evidence obtained by Cheryl Wheeler while she was acting as an agent for the government.[1] Among those grounds

[1] In Shelton's petition, footnote 1 provides as follows:

The motion to suppress, and the supplement to it, alleged that the searches, and seizures of evidence, did not fall into any of the exceptions to the warrant requirement of the

(Continued on following page)

were the specific allegations that "Cheryl Shelton, Camille Prather and Debbie Wheeler were paid informants for the Internal Revenue Service and was [*sic*] acting under their direction and control in making those searches and seizures;" and that Cheryl [Shelton] Wheeler "had no actual or apparent authority to consent to a search of the residence of the Defendant. . . . "

Significantly, in his supplemental memorandum in support of his motion to suppress evidence, Shelton wrote:

> The defendant did not give his consent for Cheryl to become a Government agent and search through his house to retrieve specific

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Fourth Amendment: "(5) At the time of the searches and seizures, Cheryl Shelton, Camille Prather and Debbie Wheeler had no actual or apparent authority to consent to a search of the residence of the Defendant, Jimmy D. Shelton, and the agents of the Internal Revenue Service who directed them to make the searches and seizures were aware that they lacked either actual or apparent authority to do so; (6) The searches and seizures were made without a warrant and without probable cause or authority of law; (7) The searches and seizures did not fall within any of the exceptions of the Fourth Amendment's warrant requirement; (8) There were no exigent circumstances to justify a search without a warrant; (9) The searches and subsequent seizures were unreasonable; (10) The government's conduct in targeting the Defendant, Jimmy D. Shelton, and in having his estranged wife act as a paid informant and surreptiously [*sic*] gain entrance to his house to make unlawful searches and seizures of documents and other items when the government knew that she had neither actual or apparent authority to remove the documents is a violation of due process and is so outside the norms of fundamental fairness that this Court should exercise its supervisory powers to suppress the evidence." *Defendant Jimmy Doug Shelton's Motion to Suppress Evidence Seized in Illegal Search,* pp. 2-3.

> requested items to be turned over to the IRS. If this Court finds that Cheryl had the authority to enter the defendant's home under contrived circumstances and to then search for, and turn over to the Government, items specifically identified by Government agents, then one must ask what would have prevented the agents themselves from going in and conducting the warrantless search themselves? In effect, as the Government has conceded, Cheryl *was* acting as a Government agent. If the IRS agents could not legally conduct the searches and seizures in this case, then, the same rules should apply to the searches and seizures made by Cheryl.
>
> (Supplemental Memorandum in Support of Jimmy Doug Shelton's Motion to Suppress Evidence, p. 5).

[Parenthetically, it should be noted that this is the Supplemental Memorandum relied upon by the district court in its opinion, at f.n. 1 (Pet. App. 25a), wherein the Court wrote: "[t]he defendant concedes that Cheryl Shelton's consent to cooperate with the government was voluntary." As that court recognized, however – but as the Government apparently does not (Government's Opposition, p. 9) – consent to *cooperate* and valid consent to a search are two very different things.]

In his report and recommendation, the magistrate-judge correctly recognized the distinction that Shelton had drawn, indeed that must be drawn between acts performed by the government, and acts performed by an individual. More significantly, the magistrate-judge drew the necessary distinction between consent given *to* a private third party to enter one's home, and the subsequent "transfer" of that consent to the government, to

permit governmental searches, at a time when the third party "transferring" or giving that consent is acting as an agent of the entity to whom consent is being given:

> The undersigned finds that there are significant differences between this case and the scenario presented by [*United States v.*] *Jenkins* [46 F.3d 447 (5th Cir. 1995)]. First, Cheryl Shelton had no ownership rights in the defendant Shelton's home. Moreover, she had left that home but did have permission to reenter for the purpose of picking up her personal items. There is no evidence that defendant Shelton's permission exceeded that purpose. In fact, every time he was aware Cheryl was in the house it was allegedly for picking up her mail or other personal items. She did not have unfettered permission to do what she wished. The undersigned finds that the principal reason Cheryl entered the house was to obtain evidence for the agents. This is particularly shown by the times the agents placed the area under surveillance while Cheryl entered, brought out items to be copied, and then returned the items. Picking up mail and personal items was secondary to the primary mission of assisting the government and herself. **Defendant Shelton clearly did not consent to a paid government informant entering his home to retrieve other than personal items.** (Pet. App. 45-46a).

It is in the *district* court that the constitutional distinctions that must be drawn between private action, and government action, and between consent given *to* a third party, and consent given *by* that third party, were lost – not because those distinctions were not raised, but because the district court relied upon *United States v.*

Jenkins. As noted in Shelton's Petition, *Jenkins* obliterates the distinction between private action and government action. Or, in the words of the district court:

> The Fifth Circuit visited a similar set of facts in *United States v. Jenkins*, 46 F.3d 447 (5th Cir. 1995). * * * In holding that no Fourth Amendment violation occurred, the court recognized a simple, yet cogent principle: **One who possesses the authority to engage in certain conduct before becoming an "agent" of the government may continue to engage in the same conduct without implicating the Fourth Amendment**. In the Fifth Circuit's words, "becoming an 'agent' for purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which was authorized prior to entering the agency relationship." *Jenkins*, 46 F.3d at 460. (emphasis added) (Pet. App. 26a).

On his appeal, Shelton again raised the issues that are presented to this Court. As can be seen from his opening brief, and the summary of the argument contained therein, he again contended that Cheryl Wheeler lacked the authority "to consent to these searches;" that "[he] still retained a reasonable expectation of privacy in his home;" that "[c]onsent is a question of waiver of the reasonable expectation of privacy;" and that "Cheryl [Wheeler] did not have 'common authority,' defined in *Matlock* as 'joint access or control for most purposes,' over the property to make surreptitious entries to purloin documents for the United States Government."

In short, it is only by *restating* the first question presented,[2] and by ignoring significant portions of the record, that the government can now contend that Shelton's first claim is not properly before the Court. Moreover, the Government makes no such claim whatsoever with regard to the second question presented.[3] The petition for certiorari should be granted.

2. Petitioner's claims are worthy of this Court's review

Before addressing the specific arguments made by the government against granting review in this case, it must again be pointed out that what is at issue is an entirely new exception to the warrant requirement of the Fourth Amendment. If the government has its way in this case, its right to conduct warrantless searches will become coextensive with the rights of third parties to conduct such searches, even when that third party is in fact the government. It is difficult to imagine a Fourth Amendment question *more* worthy of review.

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[2] Contrary to what the government writes, petitioner has never "contend[ed] that an individual loses her authority to consent to a government search once she becomes an agent of the government." Petitioner does contend, however, that the question of whether the government can give itself permission to search the property of a third party is worthy of this Court's review.

[3] That question is as follows:

> Whether searches conducted by a private party who is acting as a government agent are subject to the warrant requirement of the Fourth Amendment, when that private party would otherwise have the right to conduct such searches.

Against the somewhat obvious significance of this issue, the government raises three arguments: (A) that Shelton is mistaken in his argument that the Court of Appeals failed to consider the applicability of the Fourth Amendment; (B) that Shelton erred when he contended that the Court of Appeals never considered the question of whether Cheryl Wheeler's consent to the searches was voluntary; and (C) that Shelton is incorrect in contending that the decision below is inconsistent with this Court's precedent regarding "reasonable expectations of privacy that our society is prepared to recognize." These argument are addressed *seriatim*, below.

A. The Court of Appeals and the Fourth Amendment

When the Government quoted Shelton's brief at page 10 of its brief, it failed to include the entire sentence it argues against. Shelton did *not* write that the Court of Appeals "began with the flawed premise that the Fourth Amendment does not apply," Shelton wrote: "the Court of Appeals began with the flawed premise that the Fourth Amendment does not apply to government action if that action is undertaken in a 'dual capacity,' *i.e.*, if the government agent conducting the search has, or has been given the right, as a private citizen, to be where he or she is." To borrow from Mark Twain, it is the difference between "lightning," and "lightning bug."

And the Court of Appeals did begin with precisely that premise. In the second paragraph of its legal analysis, (Pet. App. 6a) the Court noted that "[v]alid consent to a search is a well-established *exception* to the normal requirement that law enforcement officers must have a

warrant grounded in probable cause before conducting a search" (emphasis added). In short, the Court of Appeals assumed that the exception was available in this case, notwithstanding Cheryl Wheeler's status as a government agent. Then the Court conducted its "extensive and thorough analysis," one which has everything to do with the relationship between Shelton and Cheryl Wheeler, and nothing to do with Fourth Amendment limits on *governmental action*.

B. Cheryl Wheeler's consent

As noted above, in the district court petitioner had conceded that "Cheryl Wheeler's consent to cooperate with the government was voluntary." As was also noted above, consent to cooperate is not synonymous with having the right, or the authority, or the ability, to consent to a search. And to put the matter most bluntly, the Court of Appeals did not consider the question of the voluntariness of Cheryl Wheeler's consent, because it never considered the *full* Fourth Amendment implications of Cheryl Wheeler's status as a government agent.

The government's suggestion that "[a]ccepting [petitioner's] logic would call into question the legitimacy of well-established practices, including plea agreements and testimony under immunity agreements" (Government's Opposition, p. 11), borders on the frivolous. Entering a plea of guilty does not make a defendant a government agent – and neither does testifying under that agreement, or under a separate immunity agreement. Hundreds of defendants do so every day, and very few of them could be seen as "agents." One becomes a government agent when

one begins to act for, and at the direction of the government. That is why Cheryl Wheeler was a government agent, which in turn is why the government should not be allowed to exempt itself from the requirements of the Fourth Amendment in this case.

C. This Court's precedent, and reasonable expectations of privacy

In his petition, Shelton repeatedly noted that the flaw at the heart of the opinion of the Court of Appeals was the Court's failure to draw the necessary distinction between governmental acts, and acts by a private citizen. In its opposition, the government suggests that opinion of the court of appeals is "fully consistent with this Court's precedent" (Government's Opposition, p. 12). It is not. A careful examination of all the relevant cases decided by this Court establishes that not one of them addresses the right of a government agent to "consent to," and thereafter conduct searches of the property of a third party. To the contrary, this Court's decisions have always emphasized one simple principle: that when the government is conducting a search, the Fourth Amendment's warrant requirement is the starting place for all inquiries.

Certiorari should be granted to address the important federal question raised by this proceeding.

CONCLUSION

Wherefore, this Court is urged to grant Jimmy Doug Shelton's petition for a writ of certiorari.

New Orleans, Louisiana, this 18th day of February, 2004.

Respectfully submitted,

MICHAEL S. FAWER
Attorney at Law
301 N. Columbia Street
Covington, Louisiana 70433
(985) 871-7200
Counsel of Record

HERBERT V. LARSON, JR.
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500

Attorneys for Petitioner
Jimmy Doug Shelton